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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H5

[redacted]

FILE: [redacted] Office: NEW YORK, NY Date: OCT 21 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York, two subsequent motions to reopen were granted and the denial was upheld twice, and the application is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Brazil who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission to the United States (adjustment of status) by fraud or willful misrepresentation.[1] The applicant's spouse is a U.S. citizen. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, at 2, dated April 29, 2009. On May 6, 2010 and August 6, 2010, the district director upheld the denial of the Form I-601 in decisions based on the applicant's two motions to reopen.

On appeal, counsel asserts that the "fraud" committed by the applicant was not willful or intentional and his spouse would suffer extreme hardship if the applicant is removed from the United States. *Letter in Support of Appeal*, at 2, dated September 1, 2010.

The record includes, but is not limited to, counsel's letter, a social worker and two psychologist letters for the applicant's spouse, the applicant's motions to reopen, the applicant's statements, country conditions information on Brazil, the applicant's spouse's statements, letters and documents related to the person who assisted the applicant with his first adjustment of status application, a letter from the applicant's spouse's friend, and financial documents for the applicant and his spouse. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status on February 24, 1995. The Form I-485 was based on a Form I-130, Petition for Alien Relative, which included a fraudulent marriage certificate and U.S. birth certificate for the petitioner. The applicant also filed a Form I-485 on November 15, 1996, August 15, 2001, September 24, 2004, and on or around September 24, 2009 in which he answered "no" to question 10 on page 3 which asks if the applicant has ever sought to procure a visa, other documentation, entry into the United States or any immigration benefit through fraud or willful misrepresentation. The record reflects that the applicant answered "no" to this question in his interviews related to these four applications.

Counsel claims that the documents presented establish that the applicant has never sought to procure a visa, other documentation, entry into the United States or any immigration benefit through fraud or willful misrepresentation. *Letter in Support of Appeal*, at 1. The applicant states that he met [redacted] in a hotel room with other Brazilians, was directed to sign blank immigration forms, was subsequently handed duly executed paperwork, filed the forms at the immigration office a few

[1] The AAO notes in the decisions from April 29, 2004, May 6, 2010 and August 6, 2010, the district director references a Form I-130, Petition for Alien Relative, in which a fraudulent marriage certificate and U.S. birth certificate were submitted. The AAO notes that fraudulent documents were submitted with the Form I-130, but the material misrepresentations in that case were related to the documents he signed (the Form I-485 and Form G-325).

blocks away from the hotel, and was given an employment authorization card. *Applicant's Statement*, at 1-2. The applicant states that he appeared for an adjustment of status interview on June 10, 2002, learned of the "fraud" that [redacted] committed without his knowledge, hired a private investigator who obtained [redacted] criminal records, and submitted the records to USCIS. *Id.* at 3. The AAO notes the October 26, 2002 investigator's report regarding the court records of [redacted] Counsel claims that the federal court records obtained by the investigator are evidence that the applicant did not know this woman or what she was doing was fraudulent, he should not be penalized for trusting this woman and he has always tried to do the right thing with each immigration case; and that the applicant provided evidence that the fraud or misrepresentation was not willful because of his lack of intent, deliberateness and knowledge of the falsity. *Motion to Reopen*, at 1, 3, dated May 29, 2009. The record includes a letter from another person who claims that she was at the same hotel meeting with the applicant and had a similar experience. *Letter from* [redacted], dated June 26, 2002. The record reflects that [redacted] pled guilty to Conspiracy to Submit False Applications to Immigration and Naturalization Service under 18 U.S.C. § 371, but there are no named victims in the records. *Letter from* [redacted] dated June 1, 2010. Counsel further cites to Section 237(a)(1)(H) of the Act to support his contention that the applicant would be eligible for a waiver of his inadmissibility before an immigration judge. Section 237(a)(1) states, in pertinent part:

(H) Waiver authorized for certain misrepresentations

> The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who-
>
> (i) (I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and
>
> (II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.
>
> (ii) is a VAWA self-petitioner.
>
> A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

There is no evidence in the record that the applicant has been admitted to the United States. He was paroled into the United States in 1998, but that does not constitute an admission for immigration purposes. As Section 237 relates to aliens admitted to the United States it does not apply here.

The AAO notes that the burden of proof is on the applicant to establish that his misrepresentations were not willful. The record contains copies of a Form I-485 received on February 24, 1995 and the related Form G-325, Biographic Information, both indicating that the applicant's spouse's name was [redacted] and both signed by the applicant. The Form I-485 contains a statement that the applicant certified under penalty of perjury that the information is correct. There is no evidence that he was unable to understand the contents of the applications. In regard to his first application, although [redacted] was convicted, the documents submitted do not establish that the applicant was unaware that his application was fraudulent other than the aforementioned statements. A review of the record fails to establish that the applicant's misrepresentations were not willful. Based on these misrepresentations, the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides, in pertinent part:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions

in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event that the qualifying relative resides in Brazil. The applicant's spouse states that it will be emotionally difficult to move back to Brazil as she and the applicant have established their lives in the United States. *Applicant's Spouse's Statement*, dated February 6, 2006. In regard to

emotional and psychological issues, the AAO notes the mental health evaluations further discussed in the second prong of the analysis. One of the psychologists states that there is no doubt that if the applicant's spouse accompanies the applicant to Brazil and loses her connection to the life she has known, she will be adversely affected and her functioning will deteriorate further. *Psychological Evaluation by* [redacted], at 2, dated May 20, 2009. Counsel states that evidence from the U.S. Department of State and various websites demonstrate that "public" health insurance in Brazil is not adequate in regard to availability and quality of treatment, the applicant's spouse would have to wait months for an appointment, and the availability of consistent treatment is precarious. *Motion to Reopen*, at 5, dated June 4, 2010. Counsel claims that "private" health insurance companies are very expensive in Brazil and the applicant's spouse has a pre-existing diagnosis. *Id.* The record includes an article which reflects that government-funded health care is hampered by insufficient funding and the hospitals tend to be extremely over-crowded; and that private healthcare is of a good standard, it can be expensive, and it is important to have health insurance. *Brazil-Healthcare and Medical Treatment*, undated. The record includes articles on general country conditions in Brazil and healthcare issues.

The AAO notes the evaluations and country conditions information presented, however, the record indicates that the problems that the applicant's spouse is experiencing are due primarily to a fear of separation from the applicant. This fear would seemingly be alleviated if she were to accompany her spouse to Brazil. In addition, she has close family members in Brazil so she would not be without a support system.

In considering the record, the AAO finds that the record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that a qualifying relative would suffer extreme hardship upon relocating to Brazil.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative remains in the United States. A friend of the applicant and his spouse, who is also a social worker, states that the applicant's spouse started to exhibit symptoms of depression, and she reported having insomnia and nightmares. *Letter from* [redacted] dated July 31, 2010. The record includes a psychological evaluation in which the psychologist states that the applicant's spouse had an unhappy marriage, her ex-husband cheated on her and used drugs, she and the applicant cannot plan on having a child for fear that the applicant may have to leave the United States, she has become depressed and anxious due to her fear of separation from the applicant, her appetite is poor, she has difficulty focusing, her sexual libido has become reduced, she has had suicidal ideation, though she has not made any suicide gestures, she is on an antidepressant, her diagnosis is major depressive disorder, and her depressive symptomotology will become exacerbated if she is separated from the applicant. *Psychological Evaluation by* [redacted] at 2-3, dated May 9, 2009. Another psychologist states that the applicant's spouse has been experiencing stress due to the fear of losing the applicant and this has caused her feelings of depression and anxiety, she has sought treatment for these feelings by starting individual psychotherapy with him, she has been making numerous mistakes and her productivity has dropped at work, her diagnosis is major depressive disorder (single episode), she has been experiencing severe headaches, and she has been prescribed [redacted] *Psychological Evaluation by* [redacted] at 1. The applicant's clinical social worker states that the applicant's spouse is in treatment with him, she sought psychotherapy for several symptoms, she has begun psychotropic medication under the care of a medical doctor, the possibility of not continuing her life with the applicant as she knows it

overwhelms the applicant's spouse with feelings of despair and suicidal ideation, and he recommends ongoing psychotherapy and continued medication. *Evaluation by* [redacted]

The applicant's spouse states that she has a mother who she helps financially. *Applicant's Spouse's Second Statement*, at 2, dated May 26, 2009. The record is not clear as to the amount of financial assistance that she provides to her mother. The applicant's spouse states that she and the applicant own a home with a mortgage, his absence would cause extreme financial hardship, and they have a lot of financial obligations. *Applicant's Spouse's Statement.* The record includes mortgage statements from 2009 in the applicant's name for two separate properties, with payments due of $5,913.72 and $7,533.96. The applicant and his spouse's 2008 federal joint tax return reflects that they receive rent from these properties. The applicant and his spouse's 2008 federal joint tax return lists a total income of $99,315. The record is not clear as to how much income the applicant's spouse would make without the applicant and the level of financial hardship that she would experience. However, based on the serious psychological issues presented in combination with the normal results of separation, the AAO finds that the applicant's spouse would suffer extreme hardship upon remaining in the United States.

While extreme hardship has been found were the applicant's spouse to remain in the United States without the applicant, a complete review of the documentation in the record fails to establish that the cumulative effect of hardship would rise to the level of extreme. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.